

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

1440 NEW YORK AVENUE, N W  
WASHINGTON, DC 20005-2111

TEL (202) 371-7000  
FAX (202) 393-5760  
www.skadden.com

DIRECT DIAL  
(202) 371-7007  
DIRECT FAX  
(202) 371-7956

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August 3, 2004

Lawrence H. Norton, Esq.  
General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463  
Attn: Ms. Alva E. Smith

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RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF THE  
GENERAL  
COUNSEL

RE: MUR 5474 – Dog Eat Dog Films, Inc. and Michael Moore

Dear Mr. Norton:

We are submitting this letter on behalf of Dog Eat Dog Films, Inc. ("Dog Eat Dog") and Michael Moore in response to the complaint filed by Dale Clausnitzer. A completed Designation of Counsel Form is enclosed. The complaint alleges that Dog Eat Dog is violating the Federal Election Campaign Act of 1971, as amended, ("FECA") by using corporate funds to pay for the film, *Fahrenheit 9/11*, (the "Film") and the websites MichaelMoore.com and Fahrenheit911.com, (the "Websites") which "promote, support and attack clearly-identified candidates." These allegations, however, are procedurally defective as well as factually and legally unfounded.

1. **The Complaint Is Procedurally Defective**

As a procedural matter, it is difficult to respond to the above-referenced complaint in that it does not contain even the minimal specificity or clarity required under Federal Election Commission ("FEC" or "Commission") rules. Indeed, Commission rules require that a complaint clearly identify the person or entity who is alleged to have committed a violation and contain a clear and concise

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recitation of the facts describing such violation. 11 C.F.R. §§ 111.4(d). The present complaint, however, contains scattershot, rambling allegations regarding certain activities mentioning the Film and various websites without even mentioning the parties who are supposed to have been involved. Thus, we are not sure who the respondents are and what allegations are leveled at which entities mentioned in the complaint. Calling the complaint a "fishing expedition" might be giving it more due than it is entitled. The complaint also lacks supporting documentation (other than a random assemblage of copies printed off of various websites) and does not distinguish between statements based on personal knowledge and statements based upon information and belief. 11 C.F.R. §§ 111.4(c), 111.4(d)(4)

Please note that the Commission and Congress have recently held hearings about the enforcement process and tightening the complaint procedure so the Commission does not expend its limited resources untangling a web of unsubstantiated statements with nothing more than general allegations mentioning FECA provisions. Thus, given the utter deficiency of this complaint, we request that it be dismissed, on procedural grounds alone, and save the Commission's valuable resources in trying to cobble together the complainant's stream of consciousness.

Provided the Commission finds that the complaint meets the procedural requirements of its regulations, we have attempted below to respond to various legal issues that could possibly arise concerning the activities mentioned in the complaint.

## **2. The Film and the Websites Do Not Violate FECA**

The Film and the Websites are not attempts by Mr. Moore to influence elections. Rather, Mr. Moore is, and has been, in the business of making documentaries on issues that are important to the country and selling them for public consumption at movie theatres. The Film addresses one of the most important issues of today – terrorism and the President's response to terrorism. Neither Mr. Moore nor Dog Eat Dog made payments to produce or distribute the Film or to advertise the Film on television or radio. As for the Websites, Westside Productions, LLC ("Westside") currently pays for their maintenance, and not Dog Eat Dog. Westside is owned by Mr. Moore and his wife and is treated as a partnership for federal income tax purposes. Mr. Moore and Westside are not federal contractors.

The complaint is also based on a faulty legal premise. Under current Commission rules, the restriction on communications that "promote, support, attack or oppose" a candidate (the "PSAO Standard") applies only to state and local political party committees and accounts maintained by federal PACs, and not to

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direct expenditures made by individuals, partnerships or corporations.<sup>1</sup> 11 C.F.R. §§ 100.24, 300.1 et. seq.; FEC, AO 2003-37. Rather, the Commission's current restrictions and requirements may apply to individual and partnership expenditures only if the communication in question qualifies as (1) an Electioneering Communication; (2) a Coordinated Communication; or (3) an Independent Expenditure. 11 C.F.R. §§ 114.2, 109.21, 109.22.

The Film and Websites do not qualify under any of the above standards. Please note, however, that even if they were to qualify, the Film and Websites would be exempt from Commission rules given that their underlying purpose is commercial in nature. Moreover, they would also be exempt as bona fide editorials and commentaries on the political process.

**a. There Is No Electioneering Communication**

The term "Electioneering Communication" is defined as any broadcast, cable, or satellite communication which (i) clearly identifies a federal candidate; (ii) is aired either thirty (30) days before a primary election or sixty (60) days before a general election; and (iii) can reach 50,000 or more of the relevant electorate. 11 C.F.R. 100.29. Broadcast, cable or satellite communication does not include the internet. Id., § 100.29(b)(1). Thus, the Websites would not qualify as an Electioneering Communication.

The Film also does not qualify as an Electioneering Communication. Indeed, the Commission opined in a recent advisory opinion ("AO") that the distribution of a documentary film identifying federal candidates would not qualify as a "broadcast" and thus would be exempt from the provisions on electioneering communications. FEC, AO 2004-15. As noted above, Mr. Moore and Dog Eat Dog did not make any expenditures regarding the production or distribution of the Film. Thus, there would be no FECA implications for Mr. Moore or Dog Eat Dog even if the Film were deemed to be an Electioneering Communication.

Even if the Film and the Websites were to both qualify as Electioneering Communications, Westside, as an LLC that has partnership status under federal tax law, and Mr. Moore would be permitted to make unlimited

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<sup>1</sup> Indeed, the Commission recently considered whether to expand the PSAO Standard beyond such party committees and PACs, and by unanimous vote decided to defer the question until later. See FEC, Minutes of Open Meeting (May 13, 2004).

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expenditures on such communications as long as they properly file reports with the Commission.

**b. There Is No Coordinated Communication**

Making expenditures on a Coordinated Communication results in an in-kind contribution to the campaign or the national party committee with which one is coordinating. To qualify as a Coordinated Communication, the communication must be a public communication that is done at the suggestion of, or after substantial discussions with, a federal candidate campaign or a national party committee. 11 C.F.R. § 109.21.

Mr. Moore and Dog Eat Dog did not have, nor are they aware of anyone else having had, any discussions with a federal candidate campaign, national party committee or even a federal political committee regarding the content, production, distribution or mode of communication, or timing of the Film or the Websites. Thus, the Film and Websites do not qualify as Coordinated Communications. Moreover, the term "public communication" does not include the internet. *Id.*, § 100.26. Thus, the Websites would not qualify as a Coordinated Communication even if there had been extensive discussions with federal campaigns regarding their content.

The complaint also alleges that Dog Eat Dog is making an in-kind contribution to certain federal political committees (*i.e.*, Committee to Re-Defeat the President, MoveOn PAC, and ABB 2004 PAC) by providing them with free or discounted webspace on MichaelMoore.com. As described above, Westside is paying for MichaelMoore.com and not Dog Eat Dog. More importantly, MichaelMoore.com does not provide webspace to anyone, including the above political committees. Rather, MichaelMoore.com provides links to other websites that may be of interest to the Film's audience. Please note that the overwhelming majority of the links are to non-political websites, such as the Children's Defense Fund and Public Citizen. To the extent that MichaelMoore.com provides links to political committees, it does so on a non-partisan basis by providing links to all of the existing national party committees, including, but not limited to, the Democratic National Committee and the Republican National Committee.<sup>2</sup>

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<sup>2</sup> Please note that MichaelMoore.com provides a link to Moveon.org, a Section 501(c)(4) non-profit organization, and not to MoveOn PAC, as erroneously alleged in the complaint.

The Commission has opined that providing links to political committees on a non-partisan basis does not result in a contribution. FEC, AO 1999-25. Even if the links are partisan, they do not result in a contribution if the owner of the website does not normally charge for the link. FEC, AO 1999-17. As described above, the links on MichaelMoore.com are non-partisan. Moreover, Mr. Moore does not regularly charge for the links. Thus, the links do not result in a contribution.

**c. There Is No Independent Expenditure**

An Independent Expenditure results if a person pays for a communication that (1) contains words expressly advocating the election or defeat of a clearly identified federal candidate; and (2) is not coordinated with a federal candidate or a national party committee. 11 C.F.R. § 100.16. Given Westside's LLC status, it may make unlimited Independent Expenditures as long as they are properly reported to the Commission.

In this case, however, there is no Independent Expenditure given that the Film and the Websites do not contain express advocacy. Thus, there is not even a reporting requirement. Please note that the Websites would not qualify as an Independent Expenditure even if they were to contain express advocacy given that the internet is not considered to be a "public communication." *Id.*, § 100.26. Although the term "public communication" is not explicitly used in the regulatory definition of Independent Expenditure, it should be read into the definition so that the rules, as a whole, make sense. Indeed, all of the other restrictions related to communications only extend to public communications. For example, only public communications may qualify as Coordinated Communications, as described above. Moreover, the requirement of placing disclaimers on express advocacy communication only applies to public communications. 11 C.F.R. § 110.11. It would be illogical and inconsistent to treat Independent Expenditures differently from communications that are coordinated. Indeed, the Commission has stated that:

Rather than conflating and confusing two separate concepts [of communications vs. public communications], the Commission, when appropriate, is establishing a consistent meaning from the repeated use of a single statutory phrase in order to promote simplicity and symmetry between the various statutory provisions and within the regulations. 67 *Fed. Reg.* 76962, 76963 (December 13, 2002).

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**d. The Film and Websites are Exempt as Commercial and Media Activity**

As described above, the Film and the Websites do not qualify under any of the Commission's current restrictions on communications. However, even if they were to qualify under these restrictions, the Film and the Websites would be exempt because of their commercial purpose. The Commission has repeatedly recognized a person's ability to engage in independent express advocacy without being subject to FECA as long as the underlying purpose is commercial and not political. For example, in AO 1994-30, the Commission permitted a corporation to produce and sell t-shirts that stated "Y for Senate" on the theory that it was "entrepreneurial activity." Id. (citing FEC, AO 1988-17). The Commission also permitted the company to pay for the promotion and advertising of the t-shirts. The present case is very similar. Mr. Moore is in the business of making documentaries regarding important issues and selling the documentaries for public consumption. The Websites act to promote the Film. The purpose of the Film and the Websites is not to influence elections.

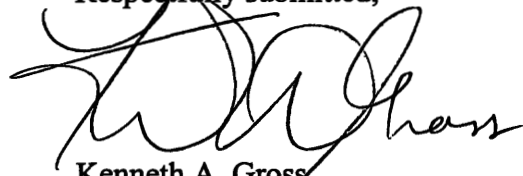
The Film and the Websites are also exempt as a commentary or editorial. Indeed, Commission rules exempt from the definition of contribution or expenditure any cost of carrying a "commentary or editorial." 11 C.F.R. § 100.73. The complaint erroneously states that this exemption is only available to "news agencies." To the contrary, the Commission has opined that this exemption is available to any "media to cover political campaigns." FEC, AO 1999-77; see also FEC, AO 1980-90 (FEC stated that the exemption is available to any "public media."). Indeed, the Commission extended this media exemption to media organizations, such as Showtime (a movie station) and MTV, which can hardly be viewed as news agencies. See FEC, AOs 2003-34, 2004-7. Similarly, Westside and Michael Moore are well recognized media producers and would be able to produce exempt commentaries and editorials, as they have through the Film and Websites.

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Lawrence H. Norton, Esq.  
August 3, 2004  
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For the foregoing reasons, the Commission should not take any further action against Mr. Moore or Dog Eat Dog.

Respectfully submitted,



Kenneth A. Gross  
Skadden, Arps, Slate, Meagher  
& Flom LLP



Ki P. Hong  
Skadden, Arps, Slate, Meagher  
& Flom LLP

Attorneys for Dog Eat Dog  
Films, Inc. and Michael Moore

Enclosure

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Frank Moore

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ELBHW LLP

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Jul-22-2004 05:46am From: SASHP LLP

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**STATEMENT OF DESIGNATION OF COUNSEL**

Please use one form for each respondent.

MUR 5474

NAME OF COUNSEL: Kenneth A. GrossFIRM: Skadden Arps Slate Meagher & Flom LLPADDRESS: 1440 New York Avenue, N.W.Washington, D.C. 20005-2111TELEPHONE: (202) 371-7007FAX: (202) 371-7956

The above-named individual is hereby designated as my counsel  
and is authorized to receive any notifications and other communications  
from the Commission and to act on my behalf before the Commission.

Michael Moore / Dog Eat Dog Films, Inc.

Print Name

8-2-04

Date

mmmoore

Signature

President

Title

RESPONDENT'S NAME: Dog Eat Dog Films, Inc./Michael MooreADDRESS: c/o CRM Management430 West 14th Street, 4th FloorNew York, NY 10014

TELEPHONE: HOME )

BUSINESS: 212 1495-5444

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